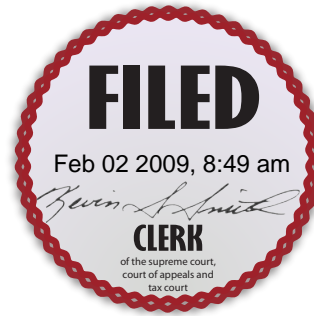


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DWIGHT G. FRY,

Appellant-Defendant,

VS.

INDIANA DEPARTMENT OF CORRECTION,
ET AL.,

PRISON HEALTH SERVICES OF INDIANA,
LLC., ET AL.,

Appellees-Plaintiffs.

[illegible]

No. 52A02-0802-CV-172

APPEAL FROM THE MIAMI CIRCUIT COURT

FEBRUARY 2, 2009

PETITION FOR REHEARING - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Dwight G. Fry (“Fry”) brings this petition for rehearing requesting that we reconsider our conclusion that his appeal should be dismissed. Fry raises three issues on rehearing, which we restate as follows:

- I. Whether this appeal should be decided on the merits because Fry’s Notice of Appeal complied with the “mail-box rule”;
- II. Whether his appeal was from an interlocutory order thereby allowing him to pursue motions against other defendants in the matter; and
- III. Whether the trial court certified the original appellate issue for interlocutory appeal.

We reaffirm our decision that Fry’s appeal should be dismissed, but grant rehearing for the limited purpose of clarifying our decision.

First, Fry claims that his appeal should have been decided on the merits because he timely filed his Notice of Appeal under the “mail-box rule.” As an initial matter, we note that in his original Appellant’s Appendix, Fry did not supply us with the necessary documentation to show his compliance with the mail-box rule regarding the filing of his Notice of Appeal.¹ The mail-box rule was announced in *Houston v. Lack*, 487 U.S. 266,

¹ A page from the “Legal Mail Log ” was supplied in the original Appellant’s Appendix; however, that particular mail log entry pertained to another of Fry’s filings and was dated January 22, 2008. *Appellant’s Appendix to Br.* at 103.

108 S.Ct. 2379, 101 L.Ed.2d 245 (1988). The Court held that the date a *pro se* prisoner delivers notice to prison authorities for mailing should be considered the date of filing, not the date of receipt. 487 U.S. at 271, 108 S.Ct. at 2382-89. That holding was discussed by a panel of this court in *McGill v. Indiana Department of Correction*, 636 N.E.2d 199, 202-03 (Ind. Ct. App. 1994).

The legal mail log entries supplied to us by Fry show that he submitted his Notice of Appeal to prison authorities on February 12, 2008, within the thirty-day deadline imposed in Indiana Appellate Rule 9(A). Accordingly, based upon the evidence presented to us now for the first time on rehearing, we find that Fry's Notice of Appeal was timely filed. Therefore, we withdraw that reason for dismissing Fry's appeal.

Next, Fry asks this court to clarify for the record that Fry's appeal in this matter was from an interlocutory order, to aid him in his pursuit of motions against other defendants in this matter in the trial court. He also asks this court to reconsider whether the trial court certified for interlocutory appeal its order granting the default judgment in favor of the Indiana Department of Correction.

Those issues were fully addressed and decided in the original opinion in this matter. Therefore, we do not address them here on rehearing.

We reaffirm our decision to dismiss Fry's appeal, but grant the petition for rehearing solely for the purpose of clarifying the reasons for that dismissal.

NAJAM, J., and VAIDIK, J., concur.